JKP Sdn Bhd v Anas Construction Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(C)(A)-825–07 OF 2020 AND P-02(C)(A)-831–07 OF 2020
HAS ZANAH MEHAT, NANTHA BALAN AND HASHIM HAMZAH JJCA
7 SEPTEMBER 2022

Building and Construction Law — Construction contracts — Adjudication of payment disputes — Adjudicator handed down adjudication decision in favour of respondent — High Court dismissed appellant's application to set aside adjudication decision and allowed respondent's application to enforce adjudication decision — Appeal against decision — Whether adjudicator acted in excess of jurisdiction — Whether there was denial of justice

These two appeals ('Appeal 825' and 'Appeal 831') were against the decision of the learned High Court judge ('HCJ'). Appeal 825 was the appellant's appeal against the decision of the learned HCJ, who dismissed the appellant's application to set aside the adjudication decision ('AD') pursuant to s 15 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'), on the grounds that the adjudicator had acted in excess of jurisdiction, had not acted independently or impartially, and that there had been a denial of natural justice. Appeal 831 was the appellant's appeal against the decision of the learned HCJ, who allowed the respondent's application to enforce the AD. Pursuant to a construction contract, the appellant had appointed the respondent as the main contractor for a project ('the contract'). A dispute arose between the appellant and the respondent regarding the construction works, and the contract was ultimately terminated. The respondent commenced several adjudication proceedings under CIPAA against the appellant for payments under the contract. The respondent claimed reimbursement of professional fees and charges payable to its consultants. In the payment claim ('PC') and the adjudication claim ('AC'), the respondent specifically pleaded cll 28, 55 and 56 of the contract as the basis of its claim against the appellant. The appellant, on the other hand, in its adjudication response, contended that the most relevant provision in the contract pertaining to the respondent's claim would be cl 36.5. The appellant also reiterated that the respondent did not invoke the said provision to support its claim. The adjudicator handed down the AD in favour of the respondent and allowed a sum of RM795,013.78 to be paid by the appellant to the respondent. The adjudicator in the AD agreed that the respondent's claim, based on cll 28, 55 and 56 of the contract, could not be sustained. However, the adjudicator decided to allow the respondent's claim based on cl 36.6 of the contract.

Held, allowing the appeals:

(1) Since cl 36.6 of the contract was not stated in the PC, it was clear that the requirements under s 5(2) of the CIPAA were not complied with. The failure to state that the respondent was relying on cl 36.6 of the contract in the PC was a clear manifestation of statutory non-compliance. On top of that, the respondent's failure resulted in the adjudicator having no jurisdiction to adjudicate on the said clause. Under s 9(1) of the CIPAA, the respondent as the claimant must serve a written adjudication claim containing the nature and description of the dispute and the remedy sought. Clause 36.6 of the contract was also not pleaded in the AC, which was fatal to the respondent's case. The adjudicator had acted in excess of his jurisdiction when he decided on matters never raised and pleaded in the PC, the payment response and all the adjudication pleadings (see paras 25, 27–28 & 30–32).

(2) The adjudicator had breached the principles of natural justice by unilaterally relying on the unpleaded cl 36.6 of the contract in making out a case for the respondent. The adjudicator went on a frolic of his own and failed to apply the rules of natural justice. He had committed a material breach of the rules of natural justice by failing to notify or bring to the attention of the parties that he was relying on the unpleaded cl 36.6 of the contract, which was the basis of his decision to allow the respondent's claim, without allowing the parties the opportunity to comment or to take their respective stands. The adjudicator was in breach of natural justice in failing to notify parties that he was relying on cl 36.6 of the contract and to allow the parties to take their respective stands (see paras 34, 38 & 41).

[Bahasa Malaysia summary

Kedua-dua rayuan ini ('Rayuan 825' dan 'Rayuan 831') adalah terhadap keputusan hakim Mahkamah Tinggi yang bijaksana ('HMT'). Rayuan 825 adalah rayuan perayu terhadap keputusan HMT yang bijaksana, yang menolak permohonan perayu untuk mengetepikan keputusan adjudikasi ('KA') menurut s 15 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'), atas alasan bahawa adjudikator telah bertindak melebihi bidang kuasa, tidak bertindak secara bebas atau saksama, dan bahawa telah berlaku penafian keadilan semula jadi. Rayuan 831 adalah rayuan perayu terhadap keputusan HMT yang bijaksana, yang membenarkan permohonan responden untuk menguatkuasakan AD. Menurut kontrak pembinaan, perayu telah melantik responden sebagai kontraktor utama bagi sesuatu projek ('kontrak'). Pertikaian timbul antara perayu dan responden mengenai kerja-kerja pembinaan, dan kontrak itu akhirnya ditamatkan. Responden memulakan beberapa prosiding adjudikasi di bawah APAIP terhadap perayu untuk bayaran di bawah kontrak. Responden menuntut pembayaran balik yuran profesional dan caj yang perlu dibayar kepada perundingnya. Dalam tuntutan bayaran

A ('TB') dan tuntutan adjudikasi ('AC'), responden secara khusus memplid klausa 28, 55 dan 56 kontrak sebagai asas tuntutannya terhadap perayu. Perayu, sebaliknya, dalam jawapan adjudikasinya, berpendapat bahawa peruntukan paling relevan dalam kontrak yang berkaitan dengan tuntutan responden ialah klausa 36.5. Perayu juga menegaskan bahawa responden tidak B menggunakan peruntukan tersebut untuk menyokong tuntutannya. Adjudikator memberikan penghakiman AD memihak kepada responden dan membenarkan sejumlah RM795,013.78 dibayar oleh perayu kepada responden. Adjudikator dalam AD bersetuju bahawa tuntutan responden, berdasarkan klausa 28, 55 dan 56 kontrak, tidak dapat dikekalkan. Walau C bagaimanapun, adjudikator memutuskan untuk membenarkan tuntutan responden berdasarkan klausa 36.6 kontrak.

Diputuskan, membenarkan rayuan:

D (1) Memandangkan klausa 36.6 kontrak tidak dinyatakan dalam TB, adalah jelas bahawa keperluan di bawah s 5(2) APAIP tidak dipatuhi. Kegagalan untuk menyatakan bahawa responden bergantung pada klausa 36.6 kontrak dalam TB adalah manifestasi jelas ketidakpatuhan statutori. Selain itu, kegagalan responden menyebabkan adjudikator tidak E mempunyai bidang kuasa untuk mengadili ke atas klausa tersebut. Di bawah s 9(1) APAIP, responden sebagai pihak yang menuntut mesti menyampaikan tuntutan adjudikasi bertulis yang mengandungi sifat dan perihal pertikaian dan remedi yang dipohon. Klausa 36.6 kontrak juga tidak diplid dalam KA, yang merupakan fatal kepada kes responden. F Adjudikator telah bertindak melebihi bidang kuasanya apabila memutuskan perkara yang tidak pernah dibangkitkan dan diplid dalam TB, jawapan pembayaran dan semua pliding adjudikasi (lihat perenggan 25, 27–28 & 30–32).

G (2) Adjudikator telah melanggar prinsip keadilan semula jadi dengan bergantung secara unilateral pada klausa 36.6 kontrak yang tidak diplid dalam menunjukkan wujud suatu kes bagi responden. Adjudikator melakukan dapatan sendiri dan gagal menggunakan peraturan keadilan semula jadi. Beliau telah melakukan pelanggaran material terhadap H peraturan keadilan semula jadi dengan gagal untuk memberitahu atau membawa kepada perhatian pihak bahawa dia bergantung pada klausa 36.6 kontrak yang tidak diplid, yang merupakan asas keputusannya untuk membenarkan tuntutan responden, tanpa memberi peluang kepada pihak-pihak untuk mengulas atau mengambil pendirian I masing-masing. Adjudikator telah melanggar keadilan semula jadi kerana gagal memberitahu pihak-pihak bahawa beliau bergantung pada klausa 36.6 kontrak dan membenarkan pihak-pihak mengambil pendirian masing-masing (lihat perenggan 34, 38 & 41).]

Cases referred to

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (refd)
Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ 732; [2016] 5 CLJ 882, HC (folld)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496; [2018] 2 CLJ 163, CA (folld)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 5(2), (2)(b), 9, 9(1), 10, 11, 15, 24, 25(i)

Appeal from: Civil Suit No PA-24C(ARB)-4–10 of 2019 (High Court, Pulau Pinang)

Mahinder Singh Dulku (with Abdul Fareed bin Abdul Gafoor and Hazirah bt Hariz) (Fareed & Co) for the appellant.
Ong Yu Shin (with Lim Wooi Ying and Lai Chian Loong) (Yu Shin Ong) for respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] There are two appeals before us, namely Civil Appeal No P-02(C)(A)-825–07 of 2020 ('Appeal 825') and Civil Appeal No P-02(C)(A)-831–07 of 2020 ('Appeal 831'). These appeals are directed at the decision of the learned High Court judge ('HCJ') dated 22 June 2020.

[2] Appeal 825 is the appellant's appeal against the decision of the learned HCJ, who dismissed the appellant's application to set aside the adjudication decision dated 12 September 2019 ('AD') pursuant to s 15 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA'), on the grounds that the adjudicator had acted in excess of jurisdiction, had not acted independently or impartially, and that there had been a denial of natural justice.

[3] Appeal 831 is the appellant's appeal against the decision of the learned HCJ, who allowed the respondent's application to enforce the AD.

[4] If Appeal 825 is allowed, then Appeal 831 must also be allowed, and vice versa. For this reason, we have directed the two appeals to be heard together.

A BRIEF FACTS LEADING TO THE PRESENT APPEALS

[5] Pursuant to a construction contract dated 9 April 2015, the appellant had appointed the respondent as the main contractor for a project known as 'Cadangan Membina dan Menyiapkan Satu (1) Blok Pangsapuri 24 Tingkat Rumah Pangsa Kos Sederhana (392) Unit) di atas Tanah Tebusguna Kerajaan, Kampung Pisang Awak, Seksyen 4, Bandar Jelutong, Daerah Timur Laut, Pulau Pinang' ('the contract').

[6] A dispute arose between the appellant and the respondent regarding the construction works, and the contract was ultimately terminated on 15 May 2017. The respondent commenced several adjudication proceedings under CIPAA against the appellant for payments under the contract.

[7] The appeals before us is concerned with Adjudication Proceeding No AIAC/D/ADJ-2469 of 2019, in which the respondent claimed reimbursement of professional fees and charges payable to its consultants, MSY Engineering Consultant and ZNA Engineering Consultant amounting to RM855,074.21.

[8] In the payment claim ('PC') and the adjudication claim ('AC'), the respondent specifically pleaded cll 28, 55 and 56 of the contract as the basis of its claim against the appellant.

[9] The appellant, on the other hand, in its adjudication response ('AR'), contended that the most relevant provision in the contract pertaining to the respondent's claim would be cl 36.5. The appellant also reiterated that the respondent did not invoke the said provision to support its claim. The relevant part of the appellant's contention in the AR is reproduced below:

> 18. In so far as the instant is concerned, regarding the claim of the professional fees of the Claimant's consultants, *the crucial provision of the Construction Contract is clause 36.5 of the Construction Contract* which provides that 'Unless the Contract otherwise provides, the cost of making any test shall be borne by the contractor if such test is:
>
> (a) Proposed by the contractor, or
>
> (b) clearly intended by or provided for in the contract.'
>
> The other relevant clauses are 1.2(a), 3.3, 5.1(b) 5.2, 6.1,10.0(a), 31.0 and 33.0 of the Construction Contract. *Be that as it may it is significant to note that the Claimant is not invoking the above provisions in support of its claim.* (Emphasis added.)

[10] For the sake of completeness, cl 28 provides for the payment to the contractor and interim certificates, cl 55 provides for the events and consequences of default by the appellant, and cl 56 provides for the certificate of termination costs.

[11] On 12 September 2019, the adjudicator handed down the AD in favour of the respondent and allowed a sum of RM795,013.78 to be paid by the appellant to the respondent. The adjudicator in the AD agreed that the respondent's claim, based on cll 28, 55 and 56 of the contract, could not be sustained. However, the adjudicator decided to allow the respondent's claim based on cl 36.6 of the contract. According to the adjudicator, cl 36.6 of the contract was most applicable in the respondent's claim (see para 100 of the AD).

[12] For the sake of completeness, cl 36.6 of the contract reads:

> Notwithstanding anything in clause 36.5 the Contractor carries out any further test as required by the S.O. pursuant to clause 36.2, and the result of such test shows the workmanship or materials is not in accordance with the provisions of the Contract, then the cost of such test shall be borne by the Contractor. But if the result of such test shows the workmanship or materials comply with the provisions of the Contract, then the cost of such test shall be borne by the Government deleted JKP Sdn Bhd.

[13] It is pertinent to note that cl 36.6 of the contract was not relied upon by the respondent in the PC or the AC. Therein lies the central focus of this appeal.

THE LAW

[14] We agree with His Lordship David Wong JCA (as he then was) in delivering the majority judgment of this court in the case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496; [2018] 2 CLJ 163 who held that:

> [55] *The courts' power to set aside adjudicators' decision is circumscribed by statute in s 15 of the CIPAA 2012* and it is not a provision which allows the courts to sit in an appellate jurisdiction. *The grounds which the courts can rely on to set aside the adjudicator's decision are limited such that the courts are not allowed to look into the merits of parties' case*. The courts' prima facie duty must be to uphold the adjudicator's decision and not to look at it with a fine-tooth comb with the aim to find the faults in the adjudicator's decision. *As long as the learned adjudicator had approached his task by adhering to the due process of his adjudication, the courts will not interfere*. Only with this approach by the courts, will the aim of the CIPAA 2012 of providing a regime to alleviate the cash problem faced by contractors in the building industry be addressed and achieved. (Emphasis added.)

[15] Section 15 of the CIPAA reads:

> Section 15 Improperly procured adjudication decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> (c) the adjudicator has not acted independently or impartially; or
>
> (d) the adjudicator has acted in excess of his jurisdiction.

[16] We now consider the issues raised by both parties raised in these appeals.

OUR FINDINGS

[17] First and foremost, we had gone through the appeal records and found that the respondent's claim against the appellant before the adjudicator was premised on cll 28, 55 and 56 of the contract. This can be seen pleaded by the respondent in its PC and AC. There was no mention of cl 36.5 or 36.6 of the contract.

[18] It is also apparent to us that the appellant had made their position very clear in its AR that the respondent's cause of action under cll 28, 55 and 56 of the contract could not be sustained, and the most relevant provision should be cl 36.5, which the respondent did not invoke.

[19] On the other hand, it was expressly or implicitly agreed that cll 28, 55 and 56 of the contract did not apply to the respondent's claim. The adjudicator was of the opinion that cl 36.6 of the contract was most applicable to the respondent's claim.

[20] Without the respondent pleading its claim under the said provision and without inviting the parties to comment or submit on this issue, the adjudicator allowed the respondent's claim against the appellant.

[21] The question before us is whether the adjudicator, by his conduct, had acted in excess of jurisdiction and whether there was a denial of natural justice in making the AD in favour of the respondent.

[22] On this issue, the learned HCJ found that:

> 21. Walaupun klausa 36.5 dan klausa 36.6 ini tidak diplidkan ianya tidak mencacatkan kes defendan kerana fakta material yang *construction contract* itu

diplidkan sudah mencukupi. Lagipun hanya klausa 36.5 dan 36.6 yang relevan dalam prosiding ini untuk pertimbangan adjudikator tidak dengan klausa-klausa yang lain.

22. Jadi mahkamah ini dapati yang pihak adjudikator tidak bertindak di luar bidangkuasanya.

[23] We disagree with the learned HCJ for the following reasons.

First issue: Whether the adjudicator had acted in excess of his jurisdiction

[24] The first issue is whether the adjudicator may proceed to make out a cause of action per cl 36.6 of the contract when the claim presented before him was predicated on cll 28, 55 and 56 of the contract, especially when there was no attempt to amend the AC.

[25] Since cl 36.6 of the contract was not stated in the PC, it is clear that the requirements under s 5(2) of the CIPAA were not complied with.

[26] Under s 5(2)(b) of the CIPAA, it is mandatory for the respondent to state in the PC the details to identify the cause of action, including the provision in the construction contract to which the payment relates. For the sake of completeness, s 5 of the CIPAA is reproduced below:

Section 5 Payment claim

(1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.

(2) *The payment claim shall he in writing and shall include —*

(a) the amount claimed and due date for payment of the amount claimed;

(b) *details to identify the cause of action including the provision in the construction contract to which the payment relates*;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act. (Emphasis added.)

[27] Here, the failure to state that the respondent was relying on cl 36.6 of the contract in the PC was a clear manifestation of statutory non-compliance.

[28] On top of that, the respondent's failure resulted in the adjudicator having no jurisdiction to adjudicate on the said clause. Section 27 of the CIPAA reads:

Section 27 Jurisdiction of adjudicator

(1) Subject to subsection (2), *the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.*

(2) The parties to adjudication *may at any time by agreement in writing extend the jurisdiction of the adjudicator* to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1). (Emphasis added.)

[29] In *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479, His Lordship Zulkefli Ahmad Makinudin PCA (as he then was) speaking for the Federal Court stated in no uncertain terms that:

[55] By s 27(1) of the CIPAA, the arbitrator's jurisdiction 'is limited to the matter referred to adjudication' pursuant to ss 5 and 6 of the CIPAA. It refers to the 'identification of the cause of action' in relation to the construction contract as required under s 5(2)(b) of the CIPAA. In turn, the payment response under s 6 of the CIPAA is defined and limited by the claim under s 5 of the CIPAA.

[56] *In short, s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the CIPAA, which is the 'cause of action' identified by the claimant by reference to the applicable clause of the construction contract.* Thus, if the payment claim relates to progress claim No 28 (as in the present case), the adjudicator's jurisdiction is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No 28.

[57] *It can thus be said that the appellant's case regarding the jurisdiction referred to in s 27(1) of the CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract.* By s 27(2) of the CIPAA, the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim.

[58] In contrast to jurisdiction, the 'powers' of the adjudicator are listed in ss 25 and 26 of the CIPAA under the specific heading of Powers of the Adjudicator'. *It follows that an adjudicator may exercise all or any of the powers under ss 25 and 26 of the CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject matter referred to him pursuant to ss 5 and 6 of the CIPAA.* (Emphasis added.)

[30] In addition, under s 9(1) of the CIPAA, the respondent as the claimant must serve a written adjudication claim containing the nature and description of the dispute and the remedy sought. The relevant provision reads:

Section 9 Adjudication claim

(1) The claimant shall, within ten working days from the receipt of the acceptance of appointment by the adjudicator under subsection 22(2) or 23(2), *serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.*

(2) The claimant shall provide the adjudicator with a copy of the adjudication claim together with any supporting document within the time specified under subsection (1). (Emphasis added.)

[31] However, we found that cl 36.6 of the contract was also not pleaded in the AC, which in our view, is fatal to the respondent's case. It is clear from the decision of the Federal Court in *View Esteem* that the adjudication pleadings in ss 9–11 of the CIPAA are pivotal and not mere formal manifestations of the dispute. The relevant part of the judgment reads:

[41] With respect to the above reasoning of the High Court *it is untenable to reduce the adjudication pleadings in ss 9–11 of the CIPAA to mere 'formal manifestations' of the dispute*. If it were so, and speed is the overriding consideration under the CIPAA, it would be easier for the legislative draftsman to dispense altogether with adjudication pleadings and proceed purely on the statements contained in the payment claim and the payment response under ss 5 and 6 of the CIPAA ...

... [46] We are of the considered view that *the scheme of the two stage process under the CIPAA does not warrant giving a reduced importance to the adjudication pleadings* and a greater, if not overriding, significance given to the initial documents under ss 5 and 6 of the CIPAA. (Emphasis added.)

[32] For the above reasons, we hold that the adjudicator had acted in excess of his jurisdiction when he decided on matters never raised and pleaded in the PC, the payment response ('PR') and all the adjudication pleadings.

Second issue: Whether there had been a denial of justice

[33] In the present case, it was not disputed that the adjudicator did not invite the parties to submit whether he was at liberty to rely on cl 36.6 of the contract, to which the parties never pleaded.

[34] In our view, the adjudicator had breached the principles of natural justice by unilaterally relying on the unpleaded cl 36.6 of the contract in making out a case for the respondent.

[35] Under the law, the adjudicator is obliged, among others, to comply with the principles of natural justice. Section 24 of the CIPAA states that:

Section 24 Duties and obligations of the adjudicator

The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that —

(a) there is no conflict of interest in respect of his appointment;

(b) he shall act independently, impartially and in a timely manner and avoid incurring unnecessary expense;

(c) *he shall comply with the principles of natural justice*; and

(d) there are no circumstances likely to give rise to justifiable doubts as to the adjudicator's impartiality and independence. (Emphasis added.)

[36] The Federal Court in *View Esteem* emphasised the importance for the adjudicator to comply with the principles of natural justice and held that the adjudicator's refusal to consider all the defences raised in the adjudication response amounted to a breach of natural justice. The relevant part of the judgment reads:

[64] *It follows that the 'duty and obligation of the adjudicator' as spelt out in s 24(c) of the CIPAA that 'he shall comply with the principles of natural justice would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality'.*

[65] We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd v Breyer Group Plc* [2010] All ER (D) 197 (Apr); [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At paras [24]–[28] the learned judge observed:

[24] It seems to me clear beyond doubt that the adjudicator erred in failing to take into account Breyer's defence by reference to the over-payment on batches 1–25. Whilst he was quite correct to regard the notice of adjudication as setting out the boundaries of his jurisdiction, he failed to appreciate that what Pilon were seeking by that notice was not only an interim valuation of batches 26–62, but also an interim payment of any sum considered owing to them. Whilst the valuation required him to have regard to batches 26–62 only, the concomitant claim for payment meant that the adjudicator was obliged to consider whether Breyer were right to say that a much smaller net payment was due than that contended for by Pilon, because Pilon had already been overpaid on batches 1–25. In other words, the notice of adjudication gave the adjudicator the jurisdiction to consider what, if any further sum should be paid by way of interim payment from Breyer to Pilon and that issue, of necessity, involved a consideration of Breyer's defence based on the alleged over-payment on batches 1–25.

[25] It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in Broardwell. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

[26] As a result, an adjudicator should think very carefully before ruling out a

defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

[27] I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage. I am in no doubt that is what happened here: Pilon did not wish the adjudicator to have any regard to batches 1–25, and therefore deliberately limited the scope of the adjudication notice to batches 26–62. It was their case that the over-payment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where Pilon sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

[28] In the result therefore, I consider that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice ...

[66] Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our case, w*rongly construed the scope of his jurisdiction under s 27(1) of the CIPAA in refusing to consider all the defences raised in the adjudication response.* Therefore such a decision by the adjudicator cannot stand. (Emphasis added.)

[37] For this appeal, we approve the test to determine the issue of breaches of natural justice in adjudication cases as outlined by His Lordship Lee Swee Seng J (now JCA) in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882 with reference to the case of *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), as can be seen below:

[90] ... I would follow the *guidelines laid down* in the case of *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) as follows:

[57] From this and other cases, I conclude as follows *in relation to breaches of natural justice in adjudication cases*:

(a) it must first be established that the *adjudicator failed to apply the rules of natural justice*;

(b) any breach of the rules must be more than peripheral; *they must be material breaches*;

(c) breaches of the rules will be *material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute* and is not peripheral or irrelevant;

(d) *whether the issue is decisive or of considerable potential importance* or is peripheral or irrelevant obviously involves a *question of degree which must be assessed by any judge* in a case such as this;

A (e) it is *only if the adjudicator goes off on a frolic of his own*, that is *wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment* or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no beach of the rules of natural justice in relation thereto. (Emphasis added.)

[38] In the present case, we found that the adjudicator went on a frolic of his own and failed to apply the rules of natural justice. We found that he had committed a material breach of the rules of natural justice by failing to notify or bring to the attention of the parties that he was relying on the unpleaded cl 36.6 of the contract, which was the basis of his decision to allow the respondent's claim, without allowing the parties the opportunity to comment or to take their respective stands.

[39] On this issue, learned counsel for the respondent contended that the adjudicator has the inquisitorial powers to do so under s 25(i) of the CIPAA, which reads:

> Section 25 Powers of the adjudicator
>
> The *adjudicator shall have the powers to* —
>
> ...
>
> (i) *inguisitorially take the initiative to ascertain the facts and the law required for the decision*; (Emphasis added.)

[40] However, we disagree with the learned counsel for the respondent. Even though the law bestows the inquisitorial power to the adjudicator to take the initiative to ascertain the facts and the law required for his decision, we disagree that such power extends to enable the adjudicator to unilaterally cherry-pick a specific clause of the underlying contract to make out a cause of action for a claimant where the claimant has been put on notice that the clauses relied upon are not applicable.

[41] For the above reasons, we hold that the adjudicator was in breach of natural justice in failing to notify parties that he was relying on cl 36.6 of the contract and to allow the parties to take their respective stands.

CONCLUSION

[42] In a nutshell, we are constrained to hold that the adjudicator had exceeded his jurisdiction in deciding on an unpleaded claim and was in breach of natural justice in failing to notify parties that he was relying on cl 36.6 of the contract and allowing the parties to take their respective stands.

[43] We are satisfied that in the circumstances, the learned HCJ's decision to dismiss the appellant's application to set aside the AD was plainly wrong, warranting appellate intervention on our part.

[44] We hereby order as follows:

(a) Appeal 825 is allowed, and we grant order in terms of prayer (1) of the amended originating summons (27 November 2019) (PA-24C(ARB)-4–10 of 2019) with costs of RM15,000 (here and below); and

(b) Appeal 831 is allowed, and originating summons dated 11 October 2019 (PA-24C-12–10 of 2019) is dismissed with costs of RM15,000 (here and below).

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh